U.S. Department of Labor Office of Administrative Law Judges
Washington, DC

In the Matters of

MESA CITRUS GROWERS	CASE NO. 80-TLC-10
TEMPE HARVESTING COMPANY	CASE NO. 80-TLC-11
FLETCHER FARMS	CASE NO. 80-TLC-12
PRODUCTION FARM MANAGEMENT, INC.	CASE NO. 80-TLC-13

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BEFORE: ALFRED LINDEMAN
Administrative Law Judge

DECISION AND ORDER

These cases arise under 20 C.F.R. § 655.210(a). Pursuant to timely requests for hearings filed by each of the above-named temporary labor certifications had been granted in the first

instance. In my opinion it would be an illogical elevation of form over substance to focus solely on the initial denial and ignore the. dynamic nature of the whole process which was undertaken in the absence of express regulations covering the kind of shortfall situations that materialized. In other words, it is self-evident that the purpose of section 655.210(a) of the regulations is to provide a potential remedy in the event that an employer who has received permission to utilize alien workers violates the terms and conditions of that permission. The Regional Administrator is charged with the function of overseeing the practices of all employers who have received such permission whether it was granted in the first instance as a result of "certification" by the Secretary of Labor or as in these cases, after an initial denial by the Secretary and a subsequent approval by INS. Accordingly, in the absence of any indication that employers who received permission to use alien workers after initial denials by the Secretary and subsequent approvals by INS were not intended to be covered by section 655.210(a) of the regulations it is concluded that the Regional Administrator did have the authority to act under 20 C.F.R. § 655.210(a) to issue the ineligibility letters in these cases.

Imposition of the ineligibility sanction

The regulations do not specify what standard is to be applied in reviewing the action taken by the Regional Administrator. Both respondents and the Regional Administrator have presented arguments as to whether it was "arbitrary and capricious" for the ineligibility sanction to be imposed. The application of such a standard is customary when a court is reviewing the discretionary action of an executive branch officer or when statutory or regulatory authority so directs. For example, under the instant regulations, where the initial temporary labor certification applications are denied by the Regional Administrator, section 655.212 provides for "administrative- judicial review" and specifies that the hearing officer . shall only review the record for "legal sufficiency." These cases, however, do not involve an appellate-type review of an initial denial; moreover, they are governed by a different section of the regulations, namely 20 C.F.R. § 658.422. This section contemplates a de novo exploration of "all relevant issues which are raised." 20C.F.R. § 658.422(b)(3). Therefore, I conclude that although a judicial-administrative function is being performed, it is still within the executive branch of government, and thus an independent determination must be made as to whether the facts in these cases warrant barring respondents from filing further temporary labor certification applications for the coming year.

In making this determination, the severity of the ineligibility provision in question must first be noted: it deprives respondents of the opportunity to even apply for another certification for one year. Indeed, the sanction is characterized in the regulation itself as a "penalty":

> (b) No other penalty shall be imposed by the employment service on such an employer other than as set forth in paragraph (a) of this section.

20 C.F.R. 655.210(b). Also, unlike the situation in the case of initial denials of applications for temporary labor certifications, following which countervailing evidence may be submitted to INS, once this decision becomes the final decision of the Secretary there does not appear to be any avenue for further appeal to INS. See 20 C.F.R. § 655.423(c). Thus it is my view that the

ineligibility sanction should not be imposed where the failure to comply with the terms of a temporary labor certification did not cause the type of adverse effect on U.S. workers which the procedures in question are intended to avoid, where the failure did not involve bad faith, and where the sanction is not necessary to serve the Act's purposes.

The evidence in these cases convinces me that respondents made full, good faith efforts to follow the procedures required under the Act .and regulations. Each filed the appropriate job order, made amendments where required to do so by the Regional Administrator, and cooperated and participated in the efforts to recruit sufficient numbers of U.S. workers to meet their respective harvesting needs. Once the shortfalls in anticipated U.S. workers occurred respondents adopted the steps required by the U.S. Employment Service in order to obtain its verification to INS that the policies of the Department of Labor had been observed. And after INS approved the visas for the aliens in question, respondents continued to recruit and hire U.S. workers as they were required to do under the regulations. Also, in the cases of PFM and Mesa, there is evidence that there were instructions given to require the aliens to pay for their bus transportation but that such instructions were not followed.

The foregoing evidence of good faith efforts, however, would not in my opinion exonerate respondents from their failures to provide U. S. workers with the same benefit of free transportation that was afforded to aliens if there were substantial evidence that, there was an adverse effect on U.S. workers. But I do not find such an effect in these cases. That is, against the background of the shortfall of U.S. workers and the urgency of the need to obtain workers as soon as possible to harvest ripening crops, I am not persuaded that the free transportation each respondent provided from Nogales to Phoenix on only one or two occasions caused any displacement of U.S. workers. I find it significant, for example, that although respondent PFM hired about 500 U.S. workers referred by the Arizona Department of Economic Security after the aliens came to work, and even though respondents continued to provide "day-haul" pickup service to U.S. workers from prearranged locations whenever there were a sufficient number of workers to warrant it there remained a shortage of U.S. workers.

Counsel for the Regional Administrator claims that 20 C.F.R. § 655.202(a) presumes that failure to provide U.S. workers with the same transportation benefits afforded to aliens will have an adverse effect, and he cites the testimony of Ed Schoeppner, a representative of the U.S. Employment Service, who stated that work orders, such as respondents', with no provision for free transportation or transportation advances, have only a limited possibility of being filled. As I construe 20 C.F.R. § 655.202(a), it refers to the situation, not present in these cases, where an "employer intends to advance transportation costs to foreign workers." Quite obviously, in such event the failure to accord the same benefit to U.S. workers on an ongoing basis would cause an adverse effect. Here, the evidence is that the respondents did not intend to advance transportation costs to foreign workers on a regular basis; thus there was no basis to amend the work orders (as suggested by counsel for the Regional Administrator) and it is not at all clear that the providing of free transportation on a one (or two) time basis in the special circumstances that arose in these cases would or did cause any impact on U.S. workers. For instance, on cross-examination Mr. Schoeppner acknowledged that job orders by other growers with offers of free transportation to U.S. workers often went unfilled. In sum, these are not cases where respondents intended to offer

free transportation either before or after the temporary admission of the alien workers. These were isolated pickups of aliens whose admission into the U.S. had in fact only been approved after U.S. workers who had been recruited months in advance had failed to appear. In this circumstance it would be mere speculation to say that any significant numbers of U.S. workers would have been prepared to travel long distances on extremely short notice even if free transportation had been provided.

Finally, in the unique situations presented by these cases where the existing regulations do not adequately cover "shortfall" situations,[2] I do not believe the ineligibility sanction is necessary to serve the purposes of the Act. In essence, it is my view that the sanction of preventing an employer from even applying for a temporary labor certification for one year is an appropriate remedy and a permissible administrative expedient in cases where there has been a demonstrated adverse effect on U.S. workers, bad faith on the part of the employer, or a pattern of violations. In such cases it would certainly be proper to penalize the employer and obviate the necessity of having the Regional Administrator and IKS devote time to processing another application. However, I do not find such a rigid approach to law enforcement appropriate in these cases, where it has been demonstrated that the regulations provided little if any guidance concerning shortfall situations, where the "violations" which occurred were unintentional and isolated instances, and where there is insufficient evidence that such violations caused an adverse effect on U.S. workers. In these cases, I conclude the purposes of the Act and regulations will be served by allowing respondents to file further temporary labor certification applications and having those applications processed in the normal fashion. In processing those applications with the benefit of the experience gained in these cases and in consideration of the fact that the regulations do not specifically cover shortfall situations, various conditional requirements can be imposed in order to protect U.S. workers and preclude the problems which occurred in these cases.[3]

For the foregoing reasons, it is concluded that the one-year ineligibility sanction is unwarranted in these cases.

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[2] The regulations under which these cases arise have only been effective since April 10, 1978, and the applications for temporary labor certifications were apparently the first filed by each respondent.

[3] If, for example, in the context of a near-emergency situation, such as arose in these cases, it is deemed necessary to provide "emergency" transportation for those H-2 workers approved by INS, an explicit provision could require that any employer who ultimately receives a clearance to bring alien workers into the United States after a "shortfall" of U.S. workers has been demonstrated must dispatch transportation or transportation advances to U.S. workers before or at the same time as he offers equivalent transportation benefits to alien workers.

ORDER

It is therefore ordered that the letters from the Regional Administrator notifying the respective respondents that they are ineligible to apply for temporary labor certifications for the coming year be withdrawn.

ALFRED LINDEMAN
ADMINISTRATIVE LAW JUDGE

DATED: September 5, 1980
San Francisco, California

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